Supreme Court, U.S.
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No.

IN THE

# SUPREME COURT OF THE UNITED STATES

**October Term, 1999**

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**BERNARD E. TICHENOR,**

***Petitioner,***

***versus***

**TOGO WEST, JR., SECRETARY,
DEPARTMENT OF THE ARMY,**

***Respondent.***

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## PETITION FOR WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

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498P

## QESTIONS PRESENTED

1. Is summary judgment appropriate in a discrimination where there are questions regarding the qualifications of competing candidates for a position?

2. How is the term pretext to be defined in a merit system framework?

3. Must criteria used to evaluate individuals for promotion in a merit system or hire be published and must they be demonstrated to relate to the job in question?

## LIST OF PARTIES

The Parties herein:

Bernard E. Tichenor ..... Plaintiff

Togo West, Jr., Secretary,
Department of the Army ..... Defendant

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## PETITION FOR WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

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### OPINIONS BELOW

The opinion sought to be reviewed is that of the Sixth Circuit Court of Appeals in *Bernard E. Tichenor vs. Secretary, Togowest, Jr., Department of the Army*, 1999 (Circuit Court Number 98-5244), entered May 27, 1999. The decision of the Trial Court is not officially reported.

### JURISDICTION

This is a case arising under the Age Discrimination in Employment Act, 29 USC §633(a).

The Notice of Appeal was filed February 17, 1998.

The jurisdiction of the Supreme Court of the United States is conferred by Rule 19 of the Supreme Court of the United States of America and 28 USC §2101.

## STATUTE

The statute primary to this case is the Age Discrimination in Employment Act, 29 USC §633(a).

## STATEMENT OF THE CASE

### A. Overview

The agency advertised a position of Employee Development Officer GS-235-12, vacancy announcement dated January 22, 1992 for Human Resources Office, Louisville Engineer District. The Plaintiff, age 53, made a timely application and was referred to the selecting official as "Best Qualified" candidate for the position. The Plaintiff had previously served as the Chief of Human Resources Office in another Corp of Engineer District. The Plaintiff was not selected in preference to a 38 year old internal candidate. The Plaintiff had served and was serving as a representative in unresolved Title VII activities against the agency immediately prior to the non selection. The selecting official was aware of the Title VII activities of the Plaintiff, thereby giving rise to an inference of discrimination in subject case.

The agency followed its "Merit Promotion and Placement" procedures in conducting a job analysis prior to announcing the vacancy. The analysis (RE #15 Motion by Defendant Army for Summary Judgment; Administrative Record of EEOC Complaint, Appendix at Pg. 67; Exhibit 16 of the Investigative File) resulted in a crediting plan and rating guide for applicants for the position. The crediting plan identified the High Quality Performance Criteria or the essential Knowledge, Skills and Abilities (KSA's) required to successfully perform in the announced posi-

tion. The KSA's were subsequently incorporated in the vacancy announcement (RE #15, Motion by Defendant Army for Summary Judgment; Administrative Record of EEOC Complaint; Exhibit 9 of the Investigative File). The identified KSA's were:

a. Knowledge of Government Training Programs and regulations;

b. Ability to direct and coordinate educational programs;

c. Ability to meet and deal with all levels of employees as well as representatives of other organizations;

d. Ability to communicate effectively both verbally and in writing; to include the ability to instruct classes and manage meetings.

An additional selection criteria factor identified in vacancy announcement was Leadership Potential/Skills.

The agency modified these criteria without publication of that modification, adding new criteria of recovery of education and recency of experience.

**B. Selection**

The announcement closed on January 31, 1992 and a Selection Certificate was prepared by the staffing specialist on February 6, 1992. The qualified candidates, those who had previously held a GS-12 position or higher (Plaintiff) automatically referred non-competitively. Other candidates were ranked against the crediting plan and if they were determined to be among the best qualified group were referred (RE #15, Motion by Defendant Army for Summary Judgment; Administrative Record of EEOC Complaint; Exhibit 4, pg 26 of the Investigative File). The rating guide provided a description and level definition of the skills and abilities required to satisfactorily perform

each defined KSA;. The guide also provided examples of types of experience, education or training which would be indicative of the satisfactory level for each KSA. The Plaintiff was not rated against the High Quality Performance Criteria prior to referral to the selecting supervisor. The local agency merit promotion plan permits the referral of all candidates to the selecting supervisor without ranking the group if there are no more than 10 candidates in the best qualified group.

The selecting official stated that upon receipt of the selection certificate package, he looked over the file in general and then asked a panel of subordinates to look over the file and make a recommendation to him (RE #15, Motion by Defendant Army for Summary Judgment; Administrative Record of EEOC Complaint; Exhibit 4, pg. 31 of the Investigative File). The subordinate panel developed a referral matrix (RE #15, Motion by Defendant Army for Summary Judgment; Administrative Record of EEOC Complaint; Exhibit 13 of the Investigative File) to narrow the list of candidates to recommend to the selecting official. The matrix used four criteria to narrow the list of candidates. They were:

a. Supervisory rating;
b. Recent education;
c. Recent experience;
d. Related education

Using this criteria, the panel ranked the Selectee third and the Plaintiff tenth. The selecting official looked at the panel spreadsheet and considered only the top three candidates for selection. Candidates below the top three were not further examined (RE #15, Motion by Defendant Army for Summary Judgment; Administrative Record of EEOC Complaint; Exhibit 4, pg. 43 of the Investigative File).

It is the allegation of Tichenor that the new criteria violate agency policy and created a situation wherein he

was not given an opportunity to compete with the job because of his age.

Further Tichenor's allegation that the criteria used in the job evaluation were not job related and it is further the allegation of Tichenor that he was denied consideration for the job in reprisal for his assistance of his wife in her complaint of discrimination against the agency.

## ARGUMENT

### A. Facts

At the time of the incident giving rise to this action, the Plaintiff's wife, Joan Tichenor, was employed with the Louisville District as a Position Management and Classification Specialist, GS-11. (RE #15, Motion by Defendant Army for Summary Judgment; Administrative Record of EEOC Complaint, filed in folder, pp. 86-87). On October 11, 1989, Ms. Tichenor filed an age-based Equal Employment Opportunity (EEO) complaint regarding her non-selection for promotion to the GS-12 position of Chief, Position Management and Classification Section of the Human Resources Office. (RE #15, Motion by Defendant Army for Summary Judgment; Administrative Record of EEOC Complaint filed in folder, pp. 85-87). She also filed four subsequent complaints alleging reprisal for her EEO activity. On January 22, 1992, Mr. Tichenor, who had previously assisted his wife in her EEO activity, represented her in a U. S. Army Civilian Appellate Review Agency (USACARA) fact-finding conference on Ms. Tichenor's fifth complaint concerning a performance appraisal issued March 7, 1991. (RE #15, Motion by Defendant Army for Summary Judgment; Administrative Record of EEOC Complaint filed in folder, pp. 65)

Also on January 22, 1992, a vacancy announcement was issued for an Employment Development Specialist, GS-12, Chief of the Training Branch of the Human Re-

sources Office. (RE #15, Motion by Defendant Army for Summary Judgment; Administrative Record of EEOC Complaint filed in folder, pp. 174-76). Both Mr. Tichenor and his wife applied for the position, as did the selectee, Alice Converse, a GS-11 Position Management and Classification Specialist in the Human Resources Office. (RE #15, Motion by Defendant Army for Summary Judgment; Administrative Record of EEOC Complaint filed in folder, pp. 64, 86-87, 89-90). Ms. Tichenor, rated unqualified for the position, did not make the "best qualified" list. She lacked the "one year of specialized experience required." (RE #15, Motion by Defendant Army for Summary Judgment; Administrative Record of EEOC Complaint filed in folder, pp. 114, 118, 121) The names of Mr. Tichenor, who was at that time 53, Ms. Converse, who was 38, and eight other applicants who did make the best qualified list, were referred to the selecting official, James Michael Crittenden, Chief of the Human Resources Office, for his consideration. (RE #15, Motion by Defendant Army for Summary Judgment; Administrative Record of EEOC Complaint filed in folder, pp. 119; 17-78).

Mr. Crittenden asked George Stucker, the incumbent Chief of the Training Branch to assemble a panel of three branch chiefs — Stucker, William Hash, Chief, Management and Employee Relations and Theresa Fiedler, Chief, Recruitment and Placement — to refine the list of best qualified candidates. (RE #15, Motion by Defendant Army for Summary Judgment; Administrative Record of EEOC Complaint filed in folder, pp. 124-25). The panel altered the criteria a matrix assigning rankings based on four criteria; supervisory rating, related education, recent experience and recent education. (RE #15, Motion by Defendant Army for Summary Judgment; Administrative Record of EEOC Complaint filed in folder, pp. 141-42, 271).

Mr. Tichenor had been Personnel Officer for the Corps' Pittsburgh District at one time. Tichenor was downgraded on the unadvertised, modified criteria of recency of experience and education. (RE #15, Motion by Defendant Army for Summary Judgment; Administrative Record of EEOC Complaint filed in folder, pp. 147-48). Mr. Crittenden chose to consider only the top three candidates recommended by the panel. Because of the change in criteria, Tichenor was not included in that referral. (RE #15, Motion by Defendant Army for Summary Judgment; Administrative Record of EEOC Complaint filed in folder, pp. 129, 136). On February 10, 1992, he selected Ms. Converse for the position.

On June 18, 1992, Mr. Tichenor filed an EEO complaint alleging that he had been discriminated against on the basis of his age and his assistance to his wife in her EEO activity. (RE #15, Motion by Defendant Army for Summary Judgment; Administrative Record of EEOC Complaint filed in folder, pp. 72-90). A USACARA fact-finding conference with testimony from Mr. Tichenor, Nancy Drees, the personnel staffing specialist who developed the best qualified list, Mr. Crittenden, and Mr. Hash, was held September 24, 1992. (RE #15, Motion by Defendant Army for Summary Judgment; Administrative Record of EEOC Complaint filed in folder, pp. 94-157). On October 30,1993, the USACARA investigator issued a Report of Investigation. (RE #15, Motion by Defendant Army for Summary Judgment; Administrative Record of EEOC Complaint filed in folder, pp. 63-69). On February 16, 1993, the Department of the Army's Equal Employment Opportunity Compliance and Complaints Review Agency (EEOCCRA) issued a final decision, based upon the Report of Investigation. (RE #15, Motion by Defendant Army for Summary Judgment; Administrative Record of EEOC Complaint filed in folder, pp. 30-40). On March 10, 1993.

### B. Mr. Tichenor Has Proven A Prima Facie Case Of Discrimination

In an age discrimination failure to hire case, a Plaintiff has been held to establish a prima facie case "when he shows (1) that he was in the protected age group, between forty and seventy years old; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that despite his qualifications, he was rejected;" *Wooden* v. *Board of Education*, 931 F.2d 376, 378 (6th Cir. 1991); *Hall* v. *Martin Marietta Energy Systems, Inc.*, 856 F.Supp. 1207, 1211 (W.D.Ky. 1994), aff'd, 54 F.3d 776 (6th Cir. 1995). The Fourth element is "that the position was given to a person not a member of the protect[ed] class." *Ivey* v. *Rice*, 759 F.Supp. 394, 408 (S.D. Ohio 1991), aff'd, 961 F.2d 1577 (6th Cir. 1992); *Wanger* v. *G.A. Gray Co.*, 872 F.2d 142, 145 (6th Cir. 1989). The Government has conceded that Mr. Tichenor made out a prima facie case under this modified *McDonnell Douglas* analysis.

Once the Plaintiff has established a prima facie case, the burden shifts to the Defendant to articulate a legitimate, non-discriminatory reason for its employment action. *Cox* v. *Kentucky Department of Transportation*, 53 F.3d 146, 150 (6th Cir. 1995); *Manzer* v. *Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1082 (6th Cir. 1994); *Cooley* v. *Carmike Cinemas, Inc.*, 25 F.3d 1325, 1329 (6th Cir. 1994).

The courts below incorrectly determined that the Plaintiff was attempting to demonstrate pretext by showing that he had represented his wife in a discrimination claim. In fact, Tichenor demonstrated pretext by proving the change of selection criteria, the failure of the agency to follow its own rules in the selection, the lack of validation of the new selection criteria and the vast difference between his qualifications and the qualifications of the individuals selected. Tichenor disputed the existence of good faith of the selec-

tion process. All of the proof of failure to follow rules, of modification of selection criteria, of failure to validate selection criteria, of vast differences in qualifications creates an extremely strong case by circumstantial and hard evidence that the reasons set forth by the Defendant in making its hiring decision were insufficient.

The consideration given to Plaintiff in the selection process must be examined. The Plaintiff was placed on the selection certificate "non-competitively", therefore no substantive examination of his credentials prior to being referred to the selecting official. The selecting official states that he looked over the applicants in general and then referred the list to his subordinates for evaluation and recommendations. The subordinates developed a selection matrix which uses criteria different from the High Quality Performance Criteria identified for the job prior to advertising the vacancy. The selecting official states that he only examined the top three applicants referred by his subordinates. The credentials of the Plaintiff were not examined against the announced High Quality Performance Criteria (KSA's) for the job. The selection matrix developed by the subordinates must be carefully examined. The use of recent education and recent experience appear to militate against older applicants such as the Plaintiff. In examining these criteria one must ascertain if they are job related. The job analysis worksheet for each KSA, prepared prior to the announcement, make no reference to recent education or experience (RE #15, Motion by Defendant Army for Summary Judgment; Administrative Record of EEOC Complaint; Exhibit 16 of the Investigative File). Further, the job description for the job does not make any reference to duties requiring recent formal education or experience (RE #15, Motion by Defendant Army for Summary Judgment; Administrative Record of EEOC Complaint; Exhibit 8 of the Investigative File). The vacancy

announcement makes no reference to recent education or recent experience (RE #15, Motion by Defendant Army for Summary Judgment; Administrative Record of EEOC Complaint; Exhibit 9 of the Investigative File). There is no basis in the record for use of recent education nor recent experience in screening candidates. The criteria developed in the selection matrix were never shown to be job related. If such a case could be made, it should have been identified in the job analysis and placed in the vacancy announcement.

Recent education improperly militates against older applicants such as the Plaintiff. Unless some credible argument can be made that formal education above the high school level has evolved with the passage of time, e.g. that a particular education discipline having "state of the art" changes critical to a specific job renders non-current education less applicable, no case can be made for applying a "recency" factor. If such a case could be made it should have been identified in the job analysis and advertised in the vacancy announcement.

At issue in this case is the introduction of criteria other than those identified in the vacancy announcement for use in the selection process. Criteria which were developed after the applications had been submitted. Such change in criteria developed after a review of the applications creates a climate in which discrimination can operate. The situation creates an opportunity for the selecting official to modify the criteria in such a way as to exclude unfavored individuals or classes of individuals. At the time of this vacancy announcement, this agency was under the jurisdiction of the United States District Court, Western District of Kentucky at Louisville in the Consent Decree of *Jennifer M. Payton* v. *John Marsh, Secretary of the United States Department of Army*, Civil Action No. C-87- 704-L-M. The Consent Decree dated June 28, 1990 provided for

a two year court jurisdiction over the parties. Paragraph II 2-3 of the Consent Decree Provide:

> "2. All vacancy announcements issued under the District's Merit Promotion program for GS-9 level and higher positions shall include a specific statement of the knowledge, skills and abilities to be considered in ranking applicants and determining which candidates are best qualified.
>
> 3. Vacancy announcements for positions at the GS-9 level and above shall state the criteria to be considered in making selections. In making selections, only the following may be considered: 1) those factors stated in the vacancy announcement as selection criteria, and 2) those factors stated in the vacancy announcement as the skills, knowledge and abilities to be considered in ranking applicants for a determination of the applicants to be referred to the selecting official as best qualified candidates. In developing the 'Best Qualified' referral list only those factors stated in the vacancy announcement as the skills, knowledge and abilities to be considered in ranking applicants may be considered. This provision does not prescribe or limit the substance or nature of the criteria which may be listed in a vacancy announcement, either as rating the [sic] ranking criteria, or as selecting criteria."

The agency's failure to comply with the cited provisions of the Consent Decree, in the instant case establishes intent to discriminate. Evidence of intent may be shown when a federal agency does not follow its own regulations and procedures. (SEE: *Johnson* v. *Lehman*, 679 F.2d 918 (1982)).

### C. The Qualifications of Selectee Are in Question

The qualifications of the selectee are in question. The selected individual has been with the Department of the Army, with 17 month's experience, is a personnel generalists at a Veterans Administration Hospital. The staffing

specialist awarded the selectee full credit for experience in training and development during this V.A. assignment (RE #15, Motion by Defendant Army for Summary Judgment; Administrative Record of EEOC Complaint). The job descriptions for the V.A. positions occupied by the selected individuals do not substantiate the experience credited to selectee (RE #15, Motion by Defendant Army for Summary Judgment; Administrative Record of EEOC Complaint). Memorandum in the file indicate the experience of selectee in the area of training and development at the V.A. would be minimal, perhaps 10 to 15 percent of her duties would have been in this area (trial witness Joan Tomasek will confirm this experience in trial). The creditability of the claimed work experience and the weighting given to selectee's experience in the qualifying process must be brought into question.

The selecting official states that he selected Ms. Converse based upon her documented experience in the area of training and employee development (RE #15, Motion by Defendant Army for Summary Judgment; Administrative Record of EEOC Complaint). The documented experience was the application the selectee had submitted (RE #15, Motion by Defendant Army for Summary Judgment; Administrative Record of EEOC Complaint).

The selecting official, prior to current assignment, worked in a V.A. hospital (RE #11, Michael Crittenden deposition transcript, pg. 6) and should have been aware of experience profile of V.A. personnel list.

The selecting official acknowledges that two prior discrimination complaints against him (RE #11, Michael Crittenden deposition transcript, pg. 10).

The selecting official acknowledges that he helped develop and approve the KSA's for the position (RE #11, Michael Crittenden deposition transcript).

As stated previously, the KSA's define the job qualifications necessary for the performance of the job. The selecting official went outside the KSA's in defining recency of education and recency of experience as selecting criteria.

The new and different selection criteria must be examined against the business necessity paradigm identified in *Griggs* v. *Duke Power Co.*, (1971) 401 U.S. 424 28 L.Ed.2d 158, *Watson* v. *Ft. Worth Bank and Trust* (1988) 487 U.S. 977, L.Ed.2d 827, *Albemarle Paper Co.* v. *Moody* (1975) 422 U.S. 405, 45 L.Ed. 280. In *Watson* the Court states;

> "To be justified as business necessity, a practice must directly relate to a prospective employee's ability to perform the job effectively; i.e., it must be necessary to fulfill legitimate business requirements".

The record contains no such justification for the use of the new selection criteria.

No creditable argument can be made that the Plaintiff would not have been selected, absent the discriminatory factors in the selection process. The Plaintiff was never evaluated against the High Quality Performance Criteria (KSA's) for this job.

Judgment should be rendered for the Plaintiff as a matter of law.

In this case the panel rated the ten best qualified candidates based on a matrix of four criteria: supervisory rating, recent education, and recent experience, with Ms. Converse ranking third and Mr. Tichenor tenth. These criteria were not the posted criteria for the job. Further, two of these criteria, recent education and recent experience are by their very nature age biased. Mr. Tichenor was denied the opportunity to even be considered for the position because of his age. The agency may not attempt to relate the four added selection criteria to the job. There

is no basis to conclude that one educated more recently is better qualified, or that more recent experience results in a more qualified individual. What it does assume is a bias against older candidates assuming normal progress in education, the education and much of the experience of the older candidates would necessarily be less recent than that of the younger candidate. (SEE: *Williams* v. *General Motors Corp.*, 656 F.2d 120, 130 in 17 (5th Cir., 1981) and *Hodgson* v. *Approved Personnel Service, Inc.*, 529 F.2d, 760 (4th Cir., 1926). The Court below in its opinion said that recency of education and experience created a logical criteria and did not unfairly discriminate. The ruling of the Court in this area ignores the change in criteria and ignores the rule established in *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405, 45 L.Ed.2d 280 (1975) that job relatedness of an employment criteria cannot be proven through vague and unsubstantiated hearsay. The Court further assumed a material fact not in evidence that being that recent education could include continuing education, seminar and training courses which those of varied ages could attend. Such was not the case. The grading was of university degree credited education.

Assuming arguendo that the employer has met his burden of articulating a legitimate, non-discriminatory reason for failing to hire the Plaintiff, "the burden shifts back to the Plaintiff to prove by a preponderance of the evidence that the reason proffered by the employer was not its true reason but merely a pretext for discrimination." *Cooley* v. *Carmike Cinemas, Inc.*, 25 F.3d 1325, 1329 (6th Cir. 1994); *Roush* v. *KFC Management Co.*, 10 F.3d 392, 396 (6th Cir. 1993), cert. denied, 115 S. Ct. 56 (1994); *Hawley* v. *Dresser Industries, Inc.*, 958 F.2d 720, 724 (6th Cir. 1992). The Plaintiff may prove pretext either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the

employer's proffered explanation is unworthy of credence." *Manzer* v. *Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1082 (6th Cir. 1994); *Roush* v. *KFC Management Co.*, 10 F.3d 392, 396 (6th Cir. 1993), cert. denied, 115 S. Ct. 56 (1994); *Hawley* v. *Dresser Industries, Inc.*, 958 F.2d 720, 724 (6th Cir. 1992).

Assuming arguendo that the agency has met its burden of showing the new criteria is job related, the Plaintiff may show that other tests or selection devices, without a similarly undesirable discriminatory effect would also serve the employers' legitimate business interest. In this case, the availability of the announced knowledge, skills and abilities (KSA's) which were designed to measure the High Quality Performance Criteria of the job applicants would certainly meet this threshold requirement. These are the essential KSA's identified by the agency in the job analysis prior to the vacancy announcement. Further, the job analysis identified examples of experience profiles of successful applicants for the job. This provides a readily available guide for analyzing the candidates for the job. The use of this criteria for evaluating job candidates would serve the agencies announced legitimate selection interest. *Wards Cove Packing Co., Inc.* v. *Antonio* (1989) 490 U.S. 642, 104 L.Ed.2d 733; *Watson* v. *Ft. Worth Bank and Trust* (1988) 487 U.S. 405, 45 L.Ed. 280. *Wards Cove* affirms that by such showing, respondents would prove that "{petitioners were} using {their} tests merely as a 'pretext' for discrimination.

Pretext is simply proven by the criteria used. It is further proven in that the criteria used were not the published criteria. The employer did not follow its own rules and therefore there is a presumption of bias. The misjudgment of qualifications of an applicant may be probative of whether the employer's reasons are pretext for discrimination. See: *Krodel* v. *Young*, 748 F.2d 701 (Ca. D.C., 1984).

Further, the failure of the agency to follow its own promotion/employment policies may be indications of age discrimination. See *Krodel* v. *Young, supra*. See also: *Ensuag* v. *Vulcraft Sales Corp*, 830 F.Supp. 1017 (W.D. Mich. 1993). The employer agrees that the Supreme Court has held that even if the motivating factor is correlated with age, there is nondiscrimination "under the ADEA when the factor motivating the employer is some feature other than the Plaintiff's age." However, the employer ignores the fact that the age biased criteria resulted in Tichenor's not even being considered for the job. Further, the criteria were developed without publication and only after the applications had been reviewed by the selecting official. The employer's claim may have more credence if the selecting official considered and rejected Tichenor in non-discriminatory criteria. The fact is that the hiring official did not consider Tichenor because his application had been blackballed due to the biased criteria.

Discriminatory intent was amply demonstrated.

The case herein should be reviewed in light of the recent *Kline vs. TVA,* 128 F.3d 337 (6th Cir., 1997) case.

In *Kline* the Sixth Circuit determined that where as here, the qualification of the candidates was at issue, Summary Judgment may not be appropriate. (26SCR 21, pg. 17)

Plaintiff in this case, as in *Kline* need only show indirect evidence of discrimination (26 SCR 21, pg. 17).

That fact that the criteria used in the selection were not the criteria in the KSA's and job description demonstrates that the reasons were pretextual. The fact that the use of unpublished criteria violated the consent decree in *Payton* v. *Marsh, supra*, further demonstrates pretext. (See: *Johnson* v. *Lehman*, 679 F.2d 918 (1982).

**D. Mr. Tichenor Has Demonstrated That His Non-selection Was Motivated By Retaliatory Intent**

Mr. Tichenor also alleges that he was discriminated against in reprisal for assisting his wife in her EEO activity. A Plaintiff may establish a prima facie case of retaliation under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-3, by proving:

> (1) that Plaintiff engaged in an activity protected by Title VII; (2) that the exercise of his . . . civil rights was known by the Defendant; (3) that, thereafter, the Defendant took an employment action adverse to the Plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action.

*Christopher* v. *Stouder Memorial Hospital*, 936 F.2d 870, 877 (6th Cir.), cert. denied, 502 U.S. 1013 (1991); *Lacy* v. *Bentsen*, 859 F.Supp. 1039, 1042-43 (E.D. Mich. 1993), aff'd, 25 F.3d 1049 (6th Cir. 1994); *Bacon* v. *Secretary of the Air Force*, 785 F.Supp. 1255, 1264-65 (S.D. Ohio 1991), aff'd, 7 F.3d 232 (6th Cir. 1993), cert. denied, 119 S.Ct. 1568 (1994).

This analysis is applicable to the ADEA, which at 29 U.S.C. § 623(d), prohibits private employers from discrimination against individuals for assisting in an ADEA proceeding. *Hollis* v. *Fleetguard, Inc.*, 668 F.Supp. 631, 637 (M.D. Tenn. 1987), aff'd, 848 F.2d 191 (6th Cir. 1988). The EEOC, which at 29 U.S.C. § 633a(b), is given authority to issue regulations to enforce the prohibition against age discrimination in federal employment, prohibits, at 29 C.F.R. § 1614.101(b) (994), federal employers from retaliation for participating in administrative proceedings under the ADEA. The cases alleging retaliation under Section 1614.101(b) have adopted the Title VII analysis of the burden of proof. *Parnell* v. *Stone*, 793 F.Supp. 742, 746 (E.D. Mich. 1992), aff'd, 12 F.3d 213 (6th Cir. 1993).

Mr. Tichenor meets the first prong of the prima facie case, in that he assisted his wife in her EEO complaints. Since the Defendant does not deny that Ms. Tichenor's complaints were known to Mr. Crittenden, the panel, and Mr. Drees, and that Mr. Tichenor's assistance of his wife in her EEO activity was known to Mr. Crittenden, Ms. Drees, and at least one member of the panel, the second prong is met. Mr. Tichenor meets the third prong in Mr. Crittenden's selection of Ms. Converse over him for the position of Training Officer. The causal connection has been demonstrated.

The government has not demonstrated a legitimate nondiscriminatory reasons for its action for the reasons demonstrated in the section regarding age.

Assuming arguendo that the Court determined that the employer demonstrated a legitimate nondiscriminatory reason for its action, Tichenor has demonstrated these reasons to be pretext as demonstrated in the argument above regarding age discrimination.

### E. The Case Herein Is Not Appropriate For Summary Judgment

Tichenor met his burden of proving a prima facie case in the areas of age discrimination. The question then becomes first whether the agency has demonstrated a legitimate business purpose in its decision not to hire Tichenor and second, whether that reason is pretextual.

The role of the judge at summary judgment is not to weigh the evidence but, to determine whether there is genuine fact issue for trial. See: *Talley* v. *Bravo Pitino Restaurant, Ltd.*, 61 F.3d 1241 (6th Cir., 1995). Credibility determinations, weighing of evidence, and drawing of legitimate inferences from facts are those of the jury, not the judge. All justified inferences are to be drawn in favor of the nonmoving party. See: *Morales* v. *American Honda*

*Motor Co.*, 71 F.3d 531 (6th Cir., 1995); *Agrister Fin. Corp. vs. Van Sicle*, 967 F.2d 233 (6th Cir., 1992); *United States* v. *O'Black*, 788 F.2d 1433, 1435 (10th Cir., 1986).

It is the job of the Court to determine whether there is a genuine issue of material fact. The court should determine whether there is sufficient evidence favoring the nonmovant for a finder of fact to return a verdict in that party's favor. See: *Anderson vs. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Turner and Bosseau vs. Nationwide Mutual Insurance Co.*, 989 F.Supp. 1359 (D.Kan 1997). It is not up to the court on a summary judgment motion to determine which side is likely to win.

In the case before the court, there were fact questions regarding the qualifications of the individual awarded the job as compared to those of Tichenor. There were material questions and inferences to be drawn regarding the unannounced changes to the job requirement and the failure of the agency to follow its own rules. There are inferences to be drawn from the fact that the agency never validated the modified job requirements, nor did it show that those revised standards were job related. All of these inferences should be drawn in favor of Tichenor.

Where, as here, there is a question as to the qualifications of a candidate for a job, summary judgment may not be appropriate. See: *Kline* v. *TVA, supra.*

## CONCLUSION

For the foregoing reasons, the Summary Judgment entered herein must be set aside and the case must be remanded for trial.

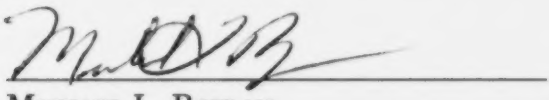
## REASONS FOR GRANTING THE WRIT

This case should be reviewed because it will further help define the term pretext pursuant to *McDonnell*

*Douglass Corp. vs. Green,* 411 U.S. 792, 802 (1973) and *St. Mary's Home Center* v. *Hicks,* 509 U.S. 502, 113 S.Ct. 2742, 2749 (1993). Pretext should be explained within the Merit System framework, where there are rigid rules regarding job announcements. There are few, if any definitive cases relating to the merit system framework. The definitions of pretext have not been well defined in this area.

Within the merit system framework can an unannounced change in criteria, developed after the selecting official views the applications demonstrate pretext?

Respectfully Submitted,



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*Counsel for Petitioner*

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was mailed this 23 day of August, 1999, to Regina S. Edwards, Assistant U. S. Attorney, Bank of Louisville Building, 510 West Broadway, 10th Floor, Louisville, Kentucky 40202; and Jennifer Payton, Assistant District Counsel, U. S. Army Corps of Engineers, P.O. Box 59, Louisville, Kentucky 40201-0059.

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# APPENDIX

**APPENDIX A**

# UNITED STATES DISTRICT COURT

**WESTERN DISTRICT OF KENTUCKY**
**AT LOUISVILLE**

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**Civil Action No. 94-0449-L(H)**

---

BERNARD E. TICHENOR - - - - - *Plaintiff*

*v.*

SECRETARY, TOGO WEST, JR.,
DEPARTMENT OF THE ARMY - - - *Defendant*

---

## MEMORANDUM OPINION—
Entered November 20, 1997

The Court now considers Defendant's motion for summary judgment. Plaintiff alleges that Defendant discriminated against him on the basis of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 633a, and retaliated against him in violation of Title VII ofthe Civil Rights Act of 1964, 42 U.S.C. §2000(e)(3).

I.

The facts in this case are undisputed. Plaintiff's wife is employed by Defendant and has pending Equal Employment Opportunity complaints against it. In the past, Plaitiff has helped his wife in these proceedings.

Defendant posted a vacancy announcement for an Employment Development Specialist, GS-12, Chief of the Training Branch of the Human Resources Office, on January 22, 1992. Both Plaintiff and his wife applied for the position. A personnel staffing specialist developed a list of "best qualified" candidates. Plaintiff and nine other candidates were selected as "best qualified" candidates. The staffing specialist, however, did not select Plaintiff's wife as "best quali-

fied" since she lacked the required qualifications. The staffing specialist gave the list of "best qualified" candidates to the selecting official, the Chief of Human Resources Office, for selection.

After a quick review of the list, the selecting official asked three of his subordinates to review the candidates and make a recommendation. The selecting official and the panel of three subordinates knew of Plaintiff and his assistance in his wife's complaints. The panel developed a referral matrix in order to narrow the candidates. The panel used as criteria in the matrix a supervisory rating, recent education, recent experience, and related education. Plaintiff ranked tenth on the matrix.

The selecting official examined the matrix and noticed a break in the point spread after the top three candidates. The selecting official chose to only consider the top three candidates for selection. As a result, Plaintiff was not selected for the position. The person ultimately selected ranked third on the matrix.

II.

Summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.* v. *CaIrett,* 477 U.S. 317, 322 (1986). Initially, the moving partymust demonstrate an absence of a genuine issue of material fact. *Id.* at 323; At this point, the burden shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson* v. *Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986). The nonmoving party may not rest on the pleadings or merely reassert previous allegations. *Matsushita ElecIric Indus.* Co., v. *Zenith Radio Corp., 475* U.S. 574, 586 (1986). Instead, the nonmoving party must "go beyond the pleadings" and show that there is a genuine issue of material fact for trial. *Celotex,* 477 U.S. at 324, If there is not a genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law.

III.

To establish a prima facie case for age discrimination under 29 U.S.C. § 633a "the plaintiff must prove (1) that he is a member of a protected class (age 40 to 70); (2) that he was subjected to an adverse employment action; (3) that he was qualified for the position; and (4) that a younger person filled the position." *Cox* v. *Kentucky Dept. Of Transportation,* 53 F.3d 146, 150 (6th Cir. 1995). Defendant concedes that Plaintiff has a prima facie case for age discrimination.

Because Plaintiff has established a prima facie case, Defendant must rebut the presumption by articulating a legitnnate, nondiscriminatory reason for its employment decision. *Manzer* v. *Diamond Shamrock Chemicals Co.,* 29 F.3d 1078, 1082 (6th Cir. 1994). The burden placed on Defendant is one of production. *Id.* Further, Defendant "need not persuade the court that it *was* actually motivated by the proffered reasons," *Texas Dept Of Community Affairs* v. *Burdine,* 450 U.S. 248, 253 (1981), since the burden of persuasion remains with P!aintiff at all times. *Id.* at 253.

In this case, Defendant stated that upon review of the "best qualified" list and the rankings of the panel, the selecting official chose the selectee based on her "experience in the area of training and development, and her proven ability to meet and deal and communicate with a variety of management officials and employees at all levels." (*AR 178*) The reason proffered by Defendant, as well as its stated hiring process, satisfies its burden of producing evidence of a legitimate, nondiscriminatory reason for its employment decision.

Once Defendant articulates a legitimate, nondiscriminatory reason for failing to hire Plaintiff, Plaintiff must prove that Defendant's stated reason was a mere pretext. *Manzer,* 29 F.3d at 1082. To meet his burden, Plaintiff must produce some evidence of pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that

the employer's stated explanation is unworthy of credence." *Burdine,* 450 U.S. at 256. The Sixth Circuit has adopted three ways to show pretext in discriminatory termination cases. Plaintiff is "required to show by a preponderance of the evidence either 1) that the proffered reasons bad no basis in fact; 2) that the proffered reasons did not actually motivate his discharge; or 3) that they were insufficient to motivate discharge." *Manzer,* 29 F.3d at 1084 (quoting *McNabola* v. *Chicago Transit Authority,* 10 F.3d 501, *513* (7th Cir. 1993)). Plaintiff, however, must introduce additional evidence of the alleged age discrimination. *Id.* Relying on the prinia facie evidence is insufficient.

Plaintiff does not dispute existence or good faith of the selection process. Thus, he cannot satisfy the first prong of the test. Further, Plaintiff provides no evidence to satisfy the third prong of the test that Defendant's reason for making its hiring choice was insufficient. Instead, Plaintiff aims his attack at the second prong of the test. Specifically, Plaintiff contends that Defendant did not select him for the position because he had assisted his wife in complaints against Defendant. Defendant admits knowledge of Plaintiff's activities during the selection process, but steadfastly denies that this information influenced the selection process. Defendant does not provide any evidence in support of this allegation. All can agree that mere suspicions are not enough to show pretext. It is insufficient here as well.

Finally, Plaintiff says that the criteria used by the panel, particularly recent experience and recent education, has a discriminatory impact on older individuals. However, Plaintiff does not introduce any evidence that recent education produces a disparate treatment of younger and older candidates. Further, rccent education can include continuing education, seminars, and training courses which individuals of varied ages could attend. The panel stated that the employment area is a very dynamic and that a good candidate should be current on the new views in the industry. Recent experience and education are logical criteria to nar-

row a field of candidates who have these desired qualifications. They are not unfairly discriminatory.

Lastly, Plaintiff argues that he is more qualified for the position than the selectee. However, it is not necessary that an employer hire the best candidate, but merely that an employer not discriminate against a candidate on the basis of age. Here, the employment specialist indicated that Plaintiff was qualified for the position. The selecting official determined, however, that the selectee was more qualified for the position based on certain desired qualifications.

From the record, no hasis exists for concluding that Defendant discriminated against Plaintiff because of his age. Plaintiff's suspicions will not sustain the cause of action.

IV.

Plaintiff alleges further that Defendant retaliated against him for his assistance in his wife's discrimination proceedings against Defendant. In other words, Plaintiff feels that Defendant did not hire him for the position in retaliation for helping his wife in causes of actions against the same employer.

A plaintiff establishes a prima facie case of retaliation under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-3, by proving:

> (1) that plaintiff engaged in an activity protected by Title VII; (2) that the exercise of his. . . civil rights was known by the defendant; (3) that, thereafter, the defendant took an employment action adverse to the plaitiff and (4) that there was a causal connection between the protecttd activity and the adverse employment action.

*Christopher* v. *Stouder Memorial Hospital,* 936 F.2d 870, 877 (6th Cir.), *cert. denied,* 502 U.S. 1013 (1991).

The record establishes that Plaintiff participated in activities protected by Title VII, that Defendant knew of his activities at the time of the selection process, and that

Defendant selected someone else for the position. Plaintiff's retaliation claim hinges on whether P!aintiff can show a causal connection between Defendant's decision and Plaintiff's activities.

The Sixth Circuit held that a "causal link requires the plaintiff to proffer evidence 'sufficient to raise the inference that her protected activity was the likely reason for the adverse action.'" *Zanders* v. *National Railroad Passenger Corp,,* 898 F.2d 1127, 1135 (6th Cir. 1990) (quoting *Cohen* v. *Fred Meyer, Inc.,* 686 F.2d 793, 796 (9th Cir. 1982)). Plaintiff has not introduced any evidence in the record which establishes a causal connection between Defendant's hiring choice and Plaintiff's assistance in his wife's complaints. Defendant has articulated a legitimate, non-discriminatory reason for its selection and Plaintiff does not offer evidence indicating that Defendant's motivation was improper. Therefore, Plaintiff is unable fulfill his burden of persuasion that Defendant's stated reason for its hiring choice is unworthy of credence. As a result, Plaintiff's cause of action for retaliation must fail.

/s/ John G. Heyburn II
John G. Heyburn II
Judge, U.S. District Court

Entered: November 20, 1997

cc: Counsel of Record

# UNITED STATES DISTRICT COURT

**WESTERN DISTRICT OF KENTUCKY**
**AT LOUISVILLE**

---

## Civil Action No. 94-0449-L(H)

---

BERNARD E. TICHENOR - - - - - *Plaintiff*

*v.*

SECRETARY, TOGO WEST, JR.,
DEPARTMENT OF THE ARMY - - - *Defendant*

---

**ORDER**—Entered November 20, 1997

Defendant has moved for summary judgment. After thoroughly reviewing the memoranda and the record as well as discussing the issues with counsel and being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Defendants' motion for summary judgment is SUSTAINED and Plaintiff's complaint is DISMISSED WITH PREJUDICE

This is a final and appealable order.

This 19th day of November, 1997.

/s/ John G. Heyburn II
John G. Heyburn II
Judge, U.S. District Court

Entered: November 20, 1997

cc: Counsel of Record

## APPENDIX B

# UNITED STATES DISTRICT COURT

**WESTERN DISTRICT OF KENTUCKY**
**AT LOUISVILLE**

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**Civil Action No. 3:94CV-449-(H)**

---

BERNARD E. TICHENOR - - - - - *Plaintiff*

*v.*

SECRETARY, TOGO WEST, JR.,
DEPARTMENT OF THE ARMY - - - *Defendant*

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**ORDER**—Entered January 20, 1998

Plaintiff has filed a Motion to Vacate Order Granting Summary Judgment Pursuant to C.R. 59(e). The United States has responded to it. To a great extent Plaintiff reargues the facts. The reargument is not persuasive at this juncture. Furthermore, *Kline* v. *Tennessee Valley Authority,* 128 F.3d 337 (6th Cir. 1997) does not mandate a different result. The Court being sufficiently advised,

IT IS HEREBY ORDERED that Plaintiff's Motion to Vacate Order Granting Summary Judgment and Order Pursuant to C.R. 59(e) is DENIED.

This 20th day of January, 1998.

/s/ John G. Heyburn II
John G. Heyburn II
Judge, U.S. District Court

Entered: January 21, 1998

cc: Counsel of Record

## APPENDIX C

**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION**

# UNITED STATES COURT OF APPEALS
## FOR THE SIXTH CIRCUIT

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**No. 98-5244**

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BERNARD E. TICHENOR, - - *Plaintiff-Appellant,*

*v.*

SECRETARY OF THE ARMY - *Defendant-Appellee.*

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*On Appeal from the United States District Court*
*for the Western District of Kentucky*

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**MEMORANDUM OPINION—**
Filed May 27, 1999

**BEFORE: JONES and COLE, Circuit Judges; and DLOTT,* District Judge.**

**PER CURIAM.** Plaintiff-Appellant, Bernard Tichenor, claims that, in refusing to promote him, his employer, the Army Corps of Engineers ("Corps"), both discriminated against him on the basis of his age, and retaliated against him. To that end, Tichenor exhausted his administrative remedies, then sought relief in the district court against the Secretary ofthe Army ("Secretary") under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §633a(a), and the retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a). Following discovery, the Secretary moved for summary judgment. The district court granted the motion as to both the ADEA and

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*The Honorable Susan J. Dlott, United States District Judge for the Southern District of Ohio, sitting by designation.

Title VII claims; Tichenor now appeals. For the reasons that follow, we affirm.

## I.

The district court accurately summarized the material, undisputed facts, as follows:

> [Tichenor's] wife is employed by [the United States Corps of Engineers, Louisville, Kentucky District,] and has [] Equal Employment Opportunity [EEO] complaints [pending] against [the Corps]. In the past, [Tichenor] has helped his wife in these proceedings.
>
> [The Corps] posted a vacancy announcement for an Employment Development Specialist . . . on January 22, 1992. Both [Tichenor] and his wife applied for the position. A personnel staffing specialist developed a list of "best qualified" candidates. [Tichenor, aged 53,] and nine other candidates were [so] selected. . . . The staffing specialist, however, did not select [Tichenor's] wife as "best qualified" since she lacked the required qualifications. The staffing specialist gave the list of "best qualified" candidates to the selecting official, [James Crittenden,] Chief of [the] Human Resources Office, for selection.
>
> After a quick review of the list, [Crittenden] asked three of his subordinates to review the candidates and make a recommendation. [Crittenden] and the panel of three subordinates knew of [Tichenor] and his assistance in his wife's complaints. The panel developed a referral matrix in order to narrow [down] the [list of] candidates. The panel used as criteria in the matrix [1] supervisory rating, [2] recent education, [3] recent experience, and [4] related education. [Tichenor] ranked tenth on the matrix.
>
> [Crittenden] examined the matrix and noticed a break in the point spread after the top three candidates. [He] chose to only consider the top three candidates for selection. As a result, [Tichenor] was not selected for the position. The person ultimately selected[,] [Alice Converse, aged 38,] ranked third on the matrix.

J.A. 4344 (brackets added).

## II.

We review summary judgment decisions *de novo* using the same Rule 56 standard applied by the district court. *Barrett* v. *Harrington,* 130 F.3d 246, 251 (6th Cir. 1997), *cert. denied* __U.S.__ 118 5. Ct. 1517 (1998). A motion for summary judgment should be granted if the evidence submitted

to the district court demonstrates that there is no genuine issue as to any material fact, and the movant (in this case, the Secretary) is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). *See Celotex Corp.* v. *Catrett,* 477 U.S. 317,322 (1986); *Anderson* v. *Liberty Lobby, Inc.,* 477 U.S. 242, 247 (1986). The court must read the evidence, and all inferences drawn therefrom, in the light most favorable to the non-moving party *(i.e.,* Tichenor). *Smith* v. *Hudson,* 600 F.2d 60, 63 (6th Cir. 1979). "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson,* 477 U.S. at 248. The court's function is not to weigh the evidence and determine the truth of the matters asserted, "but to determine whether there is a genuine issue for trial." *Id.* at 249. The relevant inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. " *Id.* at 251-52.

## III.

### A. ADEA

Because Tichenor did not come forward with direct evidence of age discrimination, his ADEA failure-to-promote claim is resolved under the familiar *McDonnell Douglas/ Burdine* burden-shifting framework. *See McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802-04 (1973); *Texas Dep 't of Community Affairs* v. *Burdine,* 450 U.S. 248, 252-53 (1981); *see also Scott* v. *Goodyear Tire & Rubber Co.,* 160 F.3d 1121, 1126 (6th Cir. 1998). To establish a *prima facie* case of age discrimination under *McDonnell Douglas*

and *Burdine,* Tichenor must demonstrate that: (1) he was between forty and sixty-five years old at the time of the alleged discrimination; (2) he was qualified for the position he did not receive; (3) he was subjected to an adverse employment action; and (4) the successful applicant was substantially younger that he. *Scott,* 160 F.3d at 1126; *Brawn* v. *Westlake City Sch. Dist. Bd. of Educ.,* No. 97-3956, 1998 WL 777989, at *2 (6th Cir. Oct. 21, 1998). In the district court, the Secretary conceded that all *four prima facie* elements were satisfied, J.A. at 45, a conclusion with which we agree. This is because Tichenor was fifty-three at the time in question; he: was qualified for the job at issue; he was not promoted into *(i.e.,* hired for) that job; and the person selected for the job, Alice Converse, was then age thirty-eight.

Once that *prima facie* burden is satisfied, the burden of production shifts to the Secretary to produce evidence of one or more legitimate, non-discriminatory reasons for the Corps's failure to promote Tichenor. *Scott,* 160 F.3d at 1126. The district court found that burden satisfied by the Corps's use of the matrix; Converse's high ranking in the matrix; Converse's relevant experience in training and development; and her ability to deal with Corps managers and employees. Considering this issue *de novo,* we agree with the district court that those four job-related concerns are each legitimate and non-discriminatory.

We thus turn to the question of pretext. Once the Secretary came forward with legitimate and non-discriminatory reasons for the failure to promote Tichenor, the burden shifted back to Tichenor to demonstrate that the Secretary's proffered reasons were merely a pretext for unlawful age discrimination — in other words, that those reasons were unworthy of credence, or that the Corps was more likely motivated by a discriminatory reason. *See Scott,* 160 F.3d at 1126; *Manzer* v. *Diamond Shamrock Chems. Co.,* 29 F.3d 1078, 1082 (6th Cir. 1994). To satisfy that burden, Tichenor needed to prove that the Secretary's proffered reasons (1) had no basis in fact; (2) did not actually motivate the Corps's hiring decision; or (3) were insuffi-

cient to motivate that decision. *Manzer,* 29 F.3d at 1084. Tichenor sought to rely on the second *Manzer* factor. Accordingly, he was required to demonstrate pretext by a preponderance of the evidence, and with evidence other than that used to satisfy his *prima facie* burden. *Id.*

In seeking to demonstrate pretext, Tichenor argues that the "recent" criteria used in the matrix was discriminatory, and evidences age bias on the part of the Corps. Specifically, Tichenor challenges the "recent education" and "recent experience" factors used in the matrix. In his view, such facially neutral factors disparately impact persons over forty, such as himself whose education and experience are relevant to the job selection process, but not "recent," because they were obtained years ago. Whether or not Tichenor's assumption is correct, he failed to satisfy his burden on summary judgment, by proving his allegations of a disparate impact via the use of statistical evidence. *See Wooden* v. *Board of Educ. of Jefferson County, Ky.,* 931 F.2d 376, 379 (6th Cir. 1991) (requiring the production, in an ADEA disparate impact case, of "sufficient statistical evidence which illustrates that the practice in question caused the exclusion ofjob applicants in the protected class"). Tichenor produced no such evidence in the district court, or before us.

Tichenor also contends that pretext is demonstrated by the fact that he possesses better job qualifications than Converse, the job selectee. This assertion is unsubstantiated, given that Converse placed significantly higher on the matrix than did Tichenor: as noted above, Converse placed third, while Tichenor placed tenth out of all ten job applicants considered in the matrix.[1] Converse's higher matrix placement suggests that she more closely met the

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[1]Nothing in the record suggests that Converse's hiring was discriminatory relative to the individuals who placed first and second in the matrix, as evidenced by the fact that neither individual is a plaintiff to this case, nor has otherwise sought relief from the Secretary.

job qualifications reasonably identified by Crittenden and his subordinates.

### B. Title VII

Tichenor's Title VII retaliation claim is also analyzed under the *McDonnell Douglas/Burdine* burden-shifting framework. *See Canitiav. Yellow Freight Sys., Inc.*, 903 F.2d 1064, 1066 (6th Cir. 1990) (per curiam).

The district court found that Tichenor failed to establish a *prima facie* retaliation claim, and we agree. To establish such a claim, Tichenor was required to show, *inter alia*, that "there was a causal connection between the [Title VII] protected activity [he engaged in] and the [Secretary's] adverse employment action *[i.e.,* the Corps's decision to promote Converse instead of Tichenor]." Id. Tichenor argues that the causal connection was the Corp's desire to retaliate against him because he helped his wife in her EEO proceedings adverse to the Corps. The district court found that the summary judgment evidence, when viewed in the light most favorable to Tichenor, merely proved that, at the time he sought his promotion, Corps officials knew Tichenor was assisting his wife with her EEO charges. As the district court correctly concluded, this evidence, if true, merely demonstrates *knowledge* on the part of the Corps, but not *causation.*

Moreover, even if such causation could somehow be demonstrated, and a *prima facie* case thus proven by Tichenor, the Secretary has come forward with legitimate, non-discriminatory reasons for the failure to promote him *(e.g.,* his low ranking in the matrix), and Tichenor has not demonstrated that the Corps's stated reasons were in any manner pretextual.

### IV.

The district court's summary judgment ruling, adverse to both of Tichenor' s claims, is therefore **AFFIRMED.**

## APPENDIX D

[EXCERPTS FROM 28 USC §2101]

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**TIME FOR APPEAL—S.C.T.**

**28 § 2101. Supreme Court; time for appeal or certiorari; docketing; stay**

**(a)** A direct appeal to the Supreme Court from any decision under Section 1253 of this title, holding unconstitutional in whole or in part, by Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

**(b)** Any other direct appeal to the Supreme Court which is authorized by law, from a decision of the district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within thirty days if final.

**(c)** Any other appeal or any writ of certiorari intended to bring any judgment or decree in civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

**(d)** The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

**(e)** An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

**(f)** In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

**(g)** The time for application for a writ of certiorari to review a decision of the United States Court of Military Appeals shall be as prescribed by rules of the Supreme Court.

(June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, § 106, 63 Stat. 104; Dec. 6, 1983, Pub.L. 98—209, § 10(b), 97 Stat. 1406; June 27, 1988, Pub.L. 100—352, § 102 Stat. 663.)

## APPENDIX E

[EXCERPTS FROM 29 USC §633a]

## AGE DISCRIMINATION

**29 § 633a. Nondiscrimination on account of age in Federal Government employment**

**(a) Federal agencies affected**

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on age.

**(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions: bona fide occupational qualification**

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment

Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this sections may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

**(c) Civil actions; jurisdiction; relief**

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such

legal or equitable relief as will effectuate the purposes of this chapter.

**(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices**

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such actio. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

**(e) Duty of Government agency or official**

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

**(f) Applicability of statutory provisions to personnel action of Federal departments, etc.**

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

**(g) Study and report to President and Congress by Equal Employment Opportunity Commission; scope**

**(1)** The Equal Employment Opportunity Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 631(b) of this title.

**(2)** The Equal Employment Opportunity Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

(Pub.L. 90—202, § 15, as added Pub.L. 93—259, § 28(b)(2), Apr. 8, 1974, 88 Stat. 74, and amended Pub.L. 95—256, § 5(a), (e), Apr. 6, 1978, 92 Stat. 191; 1978 Reorg. Plan No. 1, eff. Jan. 1, 1979, § 2, 43 F.R. 19807, 92 Stat. 3781.)